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308-186—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1968. A petition for rehearing was denied on March 7, 1968. On March 25, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari to April 30, 1968, and the petition was filed on April 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners could be convicted of conspiracy to violate 18 U.S.C. 1952(a)(3) by using interstate facilities in furtherance of a bribery scheme, where conduct sufficient to constitute the crime of bribery under Virginia law occurred prior to enactment of the federal statute, but the use of interstate facilities occurred after the federal statute was in effect.

2. Whether the trial court's instructions permitted the jury to convict petitioners of a crime different from that charged in the indictment.

3. Whether the trial court properly denied certain petitioners' motion to sever their case from that of petitioner Leigh.

4. Whether there was prejudicial error in evidentiary rulings of the trial court.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners George Faigen, Goldblatt, Cotten, and Leigh were convicted on both counts of an indictment charging them with conspiracy to violate, and substantive violations of, 18 U.S.C. 1952(a)(3). They were sentenced to two years' imprisonment on each count, the sentences to run concurrently. Petitioners Seymour Faigen and Wechsler were convicted only of conspiracy;[1] Wechsler was sentenced to two years' imprisonment, and Seymour Faigen was sentenced to eighteen months' imprisonment (C.A. 418–419).[2] The court of appeals affirmed, one judge dissenting (Pet. App. A).

The substance of the indictment was that petitioners

[1] Three other defendants, Lytton Gibson, Stuart DeBell, and William Burrage, were acquitted by the court at the conclusion of the government's case.

[2] "C.A." refers to the consolidated appendix in the court of appeals containing relevant portions of the proceedings in the district court. We are filing a copy of this appendix with the Clerk of this Court.

conspired to use, and did use, the facilities of interstate commerce in furtherance of a scheme whereby they bribed certain members of the Fairfax County Board of Supervisors to render a favorable decision on an application for rezoning of land in Fairfax County. The evidence showed that petitioners George and Seymour Faigen, Wechsler, and Goldblatt (developer defendants) were partners in an enterprise named Trailer Court Ventures. On March 9, 1960, George Faigen filed an application for a zoning change with respect to 84.3 acres of land in Fairfax County for use as a trailer park (C.A. 490). On April 25, 1961, the developer defendants placed $5,500 in escrow with the Security Bank of Washington for John Somers, an attorney, in payment for "professional services," contingent upon favorable action by the Board (C.A. 425). George Faigen's zoning application came before the Board on July 19, 1961, together with a related application by one Peachey (C.A. 194), and the matter was deferred for one week. Peachey testified that on July 24 George Faigen telephoned to advise that the "swing vote" (Mrs. Wilkins) had changed her mind and that "we had to pay through the nose" (C.A. 195–196). On July 26, the Faigen and Peachey applications were granted on the affirmative votes of Mrs. Wilkins, defendant DeBell, and petitioners Cotten and Leigh.[3] In August 1961 a citizens group instituted a lawsuit challenging the zoning change.

[3] Two dissenting votes were cast, and one Board member absented himself.

On August 7, 1961, the developer defendants instructed the Security Bank to release Somers' check. Somers picked up the check on August 18 and deposited it to his account (C.A. 142, 427, 497). Somers testified that petitioner Leigh had told him about the check and had asked him to run it through his account and that, at Leigh's request, he wrote Leigh a check for the same amount (C.A. 164, 166, 433).[4] Somers also testified that he performed no work for the developer defendants at any time and that he had not known them in 1961 (C.A. 164–165).

Petitioner Leigh deposited Somers' check for $5,500 in his bank on August 19, 1961 (C.A. 434). On August 22, Leigh wrote DeBell a check for $1,308.33 (C.A. 435); on August 23, he wrote himself a check for $1,333 (C.A. 436); and on September 9, he wrote a check to petitioner Cotten for $1,000 (C.A. 437).

On September 13, 1961, 18 U.S.C. 1952 became effective. On September 15, Cotten's secretary deposited his check (C.A. 222–223), which thereafter cleared through the use of interstate facilities.

On April 27, 1962, the Virginia courts invalidated the zoning change, and on June 20, George Faigen filed a new zoning application (C.A. 141). Three letters in connection with this application (two from petitioner Goldblatt to attorney Lytton Gibson and

[4] Leigh and Somers had shared a law office when Somers first entered into legal practice (C.A. 167). Somers testified that he assumed the transaction was in aid of a lawful business venture in which Leigh did not wish his identity to be known (C.A. 177).

one from George Faigen to Gibson) were admitted into evidence (C.A. 467, 469, 472). The zoning application was granted (with minor modifications to alleviate the prior legal defect) on July 25, 1962, on the affirmative votes of Mrs. Wilkins, defendant DeBell, petitioners Cotten and Leigh, and one other Board member.

Petitioners' defense was that they had hired Somers to represent them on their original zoning application, together with Lytton Gibson, and that the $5,500 check was in payment for Somers' services.

ARGUMENT

1. Petitioners argue that the crime of bribery under Virginia law had been completed when the $1,000 check to Supervisor Cotten was delivered, and that there was no evidence that this check had been delivered after September 13, 1961, when 18 U.S.C. 1952 became law.[5] Even though Cotten obtained payment on the check through the use of interstate facilities after September 13, 1961, thus satisfying the developers' obligation under the bribery scheme to obtain a favorable decision on their rezoning application, petitioners contend that this use of interstate facilities cannot support a conviction under Section 1952 because it was not in furtherance of any "unlawful activity," defined in the statute as "bribery * * * in violation of the laws of the State in which committed."

[5] No proof was introduced before the jury as to when Cotten's check from Leigh was delivered. Cotten and Leigh submitted affidavits in connection with their motion to dismiss the indictment, stating that the check had been personally delivered on September 9, 1961 (C.A. 43–44).

The court below properly rejected that contention as an unwarranted application of State law to limit the reach of the federal statute. We do not disagree with petitioners' lengthy argument (Pet. 15–21) that Section 1952 incorporates the elements of bribery under State law as the substance of the conduct which may not be carried on through the use of interstate commerce facilities. But that is not conclusive of the issue presented here; it does not follow that Section 1952 should be construed, as petitioners apparently contend, as a precise reflection of the various State bribery statutes.

One of the principal purposes of Section 1952 is to assist the States in the enforcement of their laws against bribery and extortion. See H. Rep. No. 966, 87th Cong., 1st Sess. As we stated in our Jurisdictional Statement in *United States* v. *Nardello* (No. 1277, this Term, p. 7): "The objective of assisting state law enforcement efforts is reflected in the withholding of federal penalties for conduct which is not an offense at all under state law." But that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach. Petitioners cite no authority which would support the position that Congress contemplated that prosecution under Section 1952 cannot be mantained if the minimum conduct necessary to sustain a State bribery conviction occurs prior to the use of interstate facilities in furtherance of the bribery scheme. Indeed, the language which Congress used in Section 1952 sug-

gests the contrary.* The wording of Section 1952(a)(3)—prohibiting the use of interstate facilities with intent to "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of * * * [bribery]"—indicates that the focus of the federal statute is the entire enterprise having as its purpose the corruption of State officials in violation of the State's laws against bribery. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.). It can hardly be denied that an essential element of the conspiracy proved here was that petitioner Cotten was to enjoy the promised compensation for his vote—which was accomplished through the use of interstate facilities after Section 1952 became effective.

Moreover, the fact that Virginia has determined that petitioners' conduct should be subject to prosecution at the time their offer of the bribe or the acceptance was made does not mean that Virginia has no interest in petitioners' subsequent activities designed to effectuate the unlawful scheme. The effect of the bribery on the State's governmental process continues so long as the transaction has not been completed on

*See 18 U.S.C. 1952(a)(1), prohibiting the use of interstate facilities with intent to "distribute the proceeds of any unlawful activity." Unless the distribution of proceeds constituted an element of the State's laws against bribery or extortion, the conduct prohibited by the federal statute would necessarily occur after the completion of the substantive State offense. Compare 18 U.S.C. 1952(a)(2), prohibitng the use of interstate facilities with intent "*to * * * commit* any crime of violence" (emphasis added), with 18 U.S.C. 1952(a)(3), quoted in the text.

both sides, for throughout that period, the payment of money will continue to influence official action. The holding of the court below—that a conspiracy to violate Section 1952 may be evidenced by the use of an interstate facility during the period of the bribery scheme—permits the federal statute to serve its intended purpose of aiding the enforcement of Virginia's laws.

Finally, disposition of the present petition is unrelated to the pendency of the appeal in *United States* v. *Nardello*, No. 1277, this Term. An appeal was taken in *Nardello* because the district court's construction of Section 1952, as not applying to acts of extortion by private persons because such conduct is punishable as blackmail under the Pennsylvania Penal Code, would seriously impair its applicability to extortionate activities in more than one-third of the States, where that type of conduct is prohibited under a different name. The controversy in the present case was occasioned primarily by the fact that Section 1952 was enacted after the bribery scheme had been initiated, and, with the passage of time, is less likely to recur. In addition, the holding of the majority is in accord with the construction given the statute by the only other court to have considered the question. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.); cf. *McIntosh* v. *United States*, 385 F. 2d 274 (C.A. 8).[7]

[7] The opinion in *United States* v. *Wingo* (C.A. 6, decided September 27, 1967), cited by both the majority and the dissent below, was withdrawn by the court on December 8, 1967. A new opinion, issued by the Sixth Circuit *en banc* on April 12, 1968, contains no discussion pertinent to the issue here.

2. Petitioners contend (Pet. 22–26) that they were convicted of a crime not charged in the indictment, or on a theory of the crime different from that originally stated by the trial judge. This argument is based upon the fact that the trial court referred to the "unlawful activity" charged in the indictment as "bribery" or "bribery * * * in re zoning activities" (C.A. 89–91, 119) in describing the charge to prospective jurors on the *voir dire* and in discussions with counsel through the close of the government's case, and subsequently as "obtaining a zoning * * * via bribery" (C.A. 369; see also C.A. 347, 359–360) in its instructions to the jury. Petitioners' attempt to magnify this difference in form of expression into a ground for reversal was properly rejected by the court below.

Petitioners' contention that the court's instruction permitted the jury to convict them of a crime not charged in the indictment is essentially a rephrasing of the argument that a conviction under Section 1952 cannot be predicated on a use of interstate facilities in furtherance of the bribery scheme after an offense under Virginia law had been completed. Our discussion in point 1 of this argument demonstrates the fallacy of that contention. With regard to the argument that the trial court's change of phraseology amounted to a "switch" in the theory of the crime, the court of appeals held that "such a switch, if indeed it occurred, would have entitled [petitioners] to

no more than a continuance on the grounds of surprise" (Pet. App. A, p. 5, n. 5). No request for a continuance was made, however, and it is apparent that petitioners were neither surprised nor prejudiced in presenting their defense. The essential issue presented to the jury, as the allegations of the indictment clearly foreshadowed, was whether the $5,500 check to Somers was in payment for legal services or was intended to be disbursed to various county supervisors in exchange for a favorable vote. The difference, if any, between the court's characterizations of the "unlawful activity" charged in the indictment was relevant, and its relevance was argued by petitioners (see *e.g.*, C.A. 282–287) only with respect to the issue of law whether the government's proof established a crime embraced within the federal statute.[8]

3. Prior to the introduction of any evidence, the developer defendants orally renewed a motion to sever the trial of petitioner Leigh. Mr. Shapiro (counsel for Goldblatt) stated that Leigh's counsel, Mr. Batchelor had informed him "that his present thinking was that his client would not take the stand in this case" (C.A. 92). Mr. Shapiro further stated that he understood that Leigh would be willing to testify for the

[8] Petitioners' reliance (Pet. 25) on *Russell* v. *United States*, 369 U.S. 749, and *Stirone* v. *United States*, 361 U.S. 212, is misplaced, since in those cases either the indictment failed to specify an element of the offense necessary to enable the defendant to prepare his defense, or the trial judge effected a prejudicial amendment of the indictment by admitting proof of an element of the offense which was not alleged in the indictment..

developer defendants[9] and to testify at his own trial, if tried separately (C.A. 93). The trial judge ruled that these representations were not a sufficient basis upon which to order a separate trial for Leigh, since even a defendant's counsel did not have the right to determine whether his client would testify (C.A. 97). The court denied the motion without prejudice to reconsideration if Leigh himself were to state that he was prepared to give exculpatory testimony on behalf of the other defendants (C.A. 96, 98). At no time did Leigh confirm Mr. Shapiro's representations.

Joint trials of co-conspirators are clearly desirable. See *Bruton* v. *United States,* No. 705, this Term (decided May 20, 1968, Slip Op. at pp. 11–12). In order to avoid a pointless severance, it was not unreasonable for the trial judge, in the exercise of his discretion, to require that Leigh personally assure the court that he was prepared to give exculpatory testimony at his co-defendants' trial. Otherwise, despite counsel's expectations, there was a likelihood that Leigh might elect to exercise his privilege against self-incrimination when called to the stand.[10]

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[9] The expected substance of Leigh's testimony was not disclosed, but petitioners now claim (Pet. 26) that Leigh would have testified that his check to petitioner Cotten was "for a wholly innocent, lawful purpose—the payment of a legal fee", and that this testimony would have exculpated all petitioners, since the jury was permitted to find them guilty if it determined that the deposit of Cotten's check was a use of interstate facilities in violation of 18 U.S.C. 1952.

[10] *United States* v. *Echeles,* 352 F. 2d 892 (C.A. 7), cited by petitioners (Pet. 27), provides no support for their position. There the court held that a severance was required where a co-defendant had three times, in open court, exculpated Echeles

4. a. William DeMik, an attorney called as a defense witness, testified that, after a conference with petitioner Wechsler in the spring of 1961, he made inquiries about Somers and reported back to Wechsler that Somers was "extremely well connected * * * with the [Fairfax] County Board" (C.A. 315–316). DeMik was then asked "Did you give Mr. Wechsler some advice?" (C.A. 316). The trial court refused to permit the question to be answered. Petitioners made an offer of proof that DeMik's answer would have been that he advised Wechsler to settle the claim with Somers (C.A. 317), thus supporting their defense that the $5,500 check to Somers was in settlement of a claim for professional services in connection with the zoning application.

The court of appeals held that it was unnecessary to determine whether exclusion of DeMik's answer was error, since the ruling did not affect petitioners' substantial rights (Pet. App. A, p. 7). That holding was correct. As the court pointed out, Lawrence Dobrow (a partner in Trailer Court Ventures) had already testified that Somers had been employed to assist in the zoning; that a fee of $15,500 had been discussed; that Wechsler had been appointed by the developer defendants to try to annul the arrangements with Somers after Gibson, the other attorney retained on the same matter, had refused to work with Somers; and that Somers' claim had been settled for $5,500

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contrary to his own penal interest (*id.* at 897–898). The present record evinces no such firm indication of a willingness on Leigh's part to give exculpatory testimony if called as a witness at petitioners' trial.

(C.A. 290–296). In addition, one Ashe had testified that he had made inquiries about Somers at Wechsler's request and had reported that Somers had influence and could be "harmful" to the zoning application (C.A. 309). DeMik's testimony was thus largely repetitive and "could have added [little] to the jury's knowledge" (Pet. App. A, p. 7).

b. Petitioners also contend that the trial court committed reversible error by failing to give proper limiting instructions in connection with the testimony of Revenue Agent Hutnick concerning, primarily, a conversation with petitioner Wechsler in 1965, after the conspiracy had terminated (Pet. 27–28).

Hutnick testified to post-conspiracy interviews with five defendants (including petitioners Wechsler, Goldblatt, and George Faigen). The subject of these interviews was the reason for the $5,500 payment to Somers, the role played by defendant Gibson, and the availability of records dealing with the rezoning (see C.A. 240–254). Hutnick began his testimony with the Wechsler interview. When it became apparent that Hutnick would testify concerning a conversation had in 1965, defense counsel asked for a limiting instruction. The court stated (C.A. 240–241):

> Insofar as it is limited to 1965, as it is limited to Mr. Wechsler, if it refers to matters occurring during the period of the charge, then it can be considered by the jury in connection with all of the defendants in determining whether there was a conspiracy and whether they ever became a member thereof.

Defense counsel objected, whereupon the court gave a

supplemental instruction to the same effect (C.A. 241–242).

Although the instruction was erroneous, since post-conspiracy declarations are admissible only against the declarant, irrespective of whether they relate to the period of the conspiracy, *Delli Paoli v. United States*, 352 U.S. 232, the error was harmless in the context of this case.

Hutnick testified that Wechsler told him that the $5,500 check to Somers (C.A. 243–244)

> * * * was in payment to Mr. Somers. He said that Trailer Court Ventures or he—a group had entered into an agreement with Mr. Somers and Somers was to do a study on, I think, on trailer parks. * * * He mentioned that this agreement called for payment of something like $15,000 to Mr. Somers and that after Mr. Somers started the study, or whatever he was to do, there was some disagreement between the members of the partnership, Trailer Court Ventures, and they decided they weren't going to go through or have Mr. Somers do the complete study, or something like that, or I think he said they weren't satisfied with Mr. Somers' work, so they settled, he said, that they—this $5,500 check was in payment to Mr. Somers in settlement of that agreement or contract that they had with him.

This account, with minor variations, was the same as the testimony of defense witnesses and was in accord with petitioners' defense that the $5,500 check was in payment to Somers for legal services rendered to Trailer Court Ventures. Hutnick's testimony, more-

over, was virtually identical to testimony (submitted under accurate limiting instructions) given by Revenue Agent McElroy, who interviewed petitioner Wechsler in November 1965, approximately a month before Hutnick's interview (C.A. 154–157). And the court's final instructions to the jury correctly stated the law with regard to post-conspiracy declarations, albeit in general terms (C.A. 371–372). In these circumstances, the court of appeals, which did not discuss the issue,[11] was justified in treating the error as harmless.[12] *Lutwak* v. *United States*, 344 U.S. 604, 619–620.[13]

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[11] The court found petitioners' contention to be "without merit" on the basis of the identical arguments made here (Pet. App. A, 7).

[12] Petitioners' contentions with regard to Hutnick's testimony concerning the Goldblatt and Burrage interviews (Pet. 28) are without substance. The evidence regarding the Goldblatt interview was admitted without objection to the court's acquiescence in defense counsel's motion that the conversation be considered only against Goldblatt (C.A. 246). The Hutnick-Burrage interview contained nothing harmful to petitioners (C.A. 250–251).

[13] This Court's decision in *Bruton* v. *United States* (No. 705, this Term, decided May 20, 1968), overruling *Delli Paoli*, does not require a different result. There the Court held that the admission of "powerfully incriminating extrajudicial statements of a codefendant" specifically implicating Bruton in the crime presented a "risk that the jury will not, or cannot, follow instructions [which] is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (Slip Op. at p. 13). To the extent that *Bruton* may be applied retroactively, the possible prejudice to codefendants resulting from the jury's consideration of the extrajudicial statements of an alleged coconspirator would seem to be minimal where, as in the present case, the hearsay statements were exculpatory as to the declarant, in no way implicated any other defendant in the crime, and in fact lent support to the theory of the defense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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